**Statement of**

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**Before the**

**Subcommittee on the Constitution**
**Committee on the Judiciary**
**United States House of Representatives**

**Concerning**

**The Voting Rights Act: Sections 6, 7 and 8– Federal Examiner and Observer Provisions**

**November 15, 2005**

Chairman Chabot, Ranking Member Nadler, distinguished members of the Subcommittee:

Thank you for inviting me to talk this afternoon about the federal examiner and federal observer provisions of the Voting Rights Act.

There are three central questions on the retention of the federal examiner and federal observer provisions of the Voting Rights Act:

1. Are the federal examiner and federal observer provisions still needed?

   The federal observer provision is still needed. Most of the federal examiner provisions are no longer are needed.

2. Should the initial assignment of federal observers to a jurisdiction remain dependent on the certification of the jurisdiction for federal examiners?

   No, but a certification-like decision should be required when federal observers are initially assigned to a jurisdiction.

3. Should the federal observer provision remain solely as a law enforcement tool, or should the findings of the observers be made immediately available to the public?

   The federal observer provision should remain as a law enforcement function. Publication of the observers' findings would be detrimental to that function.

The following is an overview of the federal examiner and federal observer provisions of the Voting Rights Act, my experience with them, and the reasons why I

have answered the questions as I have. This recitation is followed by a detailed explanation of the Voting Rights Act's provisions for federal examiners and observers—Sections 6, 7 and 8 of the Voting Rights Act—and fact situations and federal court cases that demonstrate why the federal observer provisions are still needed.

**The federal examiner and federal observer provisions had a real impact on African Americans in the South.**

I was a lawyer in the United States Justice Department's Civil Rights Division from 1966 until my retirement in January 2000. Beginning in 1973 I was partly, and shortly thereafter, wholly in charge of the Justice Department's responsibilities for the federal examiner and federal observer programs. But I began working in the Civil Rights Division as a law clerk in the summer of 1965, and I was there on August 6, 1965, when the Voting Rights Act became law. Shortly after the Act was passed I was assigned to accompany the many other employees of the Civil Rights Division who were working out of an office set up in the federal building in Selma, Alabama. Our primary job was to investigate the beatings suffered by people who earlier that year attempted to march from Selma to Montgomery, Alabama, to protest the disenfranchisement of African Americans in Alabama.

I traveled with Civil Rights Division lawyers from county to county in West Central Alabama to determine the identity of the victims of those beatings and to interview them. As we traveled, we also got information on possible violations of the provisions of the Civil Rights Act of 1964, and we stopped into the offices where federal examiners were giving African Americans their first easy, safe and fair opportunity to register vote. (Local voter registration hours and locations were so restrictive that some white people took advantage of the easy federal voter registration opportunities too.)

Those events gave rise to the issues we are addressing now, 40 years later. A discussion of these issues can easily get blurred by a numbing recitation of legal statutes, provisions and clauses, because that is how the Voting Rights Act is written. I will set out those citations later in my statement by providing sections of an article my wife and I published in the Spring 2002 edition of the Temple Political and Civil Rights Law Review. But first I want to review the federal examiner and federal observer provisions of the Voting Rights Act as they applied to people and voting in the real world.

Under the structure of the Voting Rights Act, a federal examiner can be assigned to any site in the states and counties that are specially covered under the Act's formulae in Section 4, after the county has been certified by the Attorney General of the United States (or in any county certified by court order). Of course, under the structure of the Voting Rights Act, the federal examiners do not technically register people to vote: they examine applicants as to their eligibility under state voter registration laws that are otherwise Constitutional, and then put those applicants who are found to be eligible on a list. The list is given to the local county voter registrar who is required by the Voting Rights Act to enter the eligible applicants' names on the local voter registration rolls.

In the summer and fall of 1965 people were lined up day after day to take advantage of their first opportunity to register to vote. The federal examiners were Civil Service Commission investigators who had been pulled off of the routine jobs they had been doing and sent to sites in Alabama and other Southern states that had been designated by the U.S. Attorney General for federal listing. Besides listing voter applicants, the examiners were available to take complaints about listed people who had not been placed on the county voter registration rolls.

Those examiners were not, on the whole, a happy group. Their presence in small groups of two or three was obvious in town, and their work was opposed by many of white people there. In the main, they ate alone, walked alone and talked mostly to each other. The examiners were eager to know from us, on our rounds, when they would be able to go home. Still, they persevered, and in the end they accounted for the registration of tens of thousands of people who had been discriminatorily kept off of the voter registration rolls. From 1965 to 1972 federal examiners were responsible for the registration of over 170,000 voters. They achieved a signal victory in the fight against racial discrimination in voting.

As the Voting Rights Act is structured, federally registered voters have continuing protection against attempts at keeping them from voting. In any county that has been certified for a federal examiner, the Voting Rights Act authorizes the United States Office of Personnel Management (the successor to the United States Civil Rights Commission) to assign federal observers to polling places as requested by the U.S. Attorney General, to watch voting and vote counting procedures. (Note that the certification of a county for federal examiners is a prerequisite for the assignment of federal observers, but the presence of federally listed voters in the county is not.)

That protection was badly needed in the mid-1960s for newly registered African American voters as they entered the polling places and weathered the stares of white voters and the hostility of the polling place officials. Some examples of the humiliations they faced are set out later in my statement. But for now it is enough to know that they, too, persevered, and under the protective presence of the federal observers, they cast their ballots and participated in the political life of the county for the first time.

The federal observers' job is to watch and take notes. If polling place officials choose to violate their own procedures in order to humiliate racial or minority language voters, or intimidate them, or refuse to allow them the same voting privileges in the polls as the white voters, the federal observers cannot intervene. The observers in a county have co-captains who travel from polling place to polling place, checking with the observers and getting information from them. Those observer co-captains call regularly to a central office established by the Office of Personnel Management. Originally, and for many years, this central office was known as the examiner's office, which had been established for the examiner to take complaints as is required by Section 12(e) of the Voting Rights Act. In the examiner's office there also was a lawyer from the Justice Department's Civil Rights Division (usually from the Voting Section, *nee* Voting and Public Accommodations Section). Today, since the examiner has little or no function,

especially in a county where there are no federally registered voters, the office used in the county on election day is referred to as the captain's office. The observer captain along with a Civil Rights Division attorney are there to receive the calls and the information from the observer co-captains.

When irregularities arise the Division lawyer relays the information about the irregularities to the county official in charge of the election, and allows the county official to take action to correct the irregularities. Where corrective action is not taken or is inadequate, a civil action can be filed later under the Voting Rights Act. A civil action, such as the one described below involving Conecuh County, Alabama, can use the reports of federal observers as effective and unassailable evidence of racially discriminatory actions of polling place officials. After the election the observers provide their reports to the federal examiner, the Attorney General and, if appropriate, to a federal court (if the county is certified for an examiner by a court).

The work of the federal observers as described here continued in the South largely unchanged through the 1990s. These procedures apply too, to the work of federal observers in other areas of the country with important modifications to deal with geographical differences and activities in polling places involving minority language voters.

**Federal observers are necessary, federal examiners are not necessary.**

Violations of the Voting Rights Act continue to happen in polling places throughout the United States. The need for federal observers to document discriminatory treatment of racial and language minority voters in the polls has not waned. The use of a thousand or more federal observers at election after election beginning in 1965 decreased to the use of hundreds of observers at elections after the early 1980s as a result of the effective enforcement of the Voting Rights Act in Southern states. But the enforcement of the language minority provisions of the Voting Rights Act, added in 1975, has required the use of hundreds more federal observers to disclose to Justice Department attorneys evidence of harassment of members of language minority groups, and instances where ballots and other election material and procedures are not available to those voters in a language they can understand. The result is that between 300 and 600 federal observers continued to be needed annually from 1984 to 2000.

The facts supplied by federal observers to Civil Rights Division attorneys are crucial and irreplaceable in the enforcement of the Voting Rights Act. Most parts of the voting process are open to the public, and the evidence of Voting Rights Act violations that are involved in the voting process can be obtained by Justice Department lawyers through routine investigations. But most state laws limit access to polling places on election day, allowing only voters and polling place officials to remain in the polls (police are allowed too when called to deal with disturbances). Thus, unless an exception is made in these rules to allow federal investigators to get special access to the polls, the harassment of racial and minority language voters and other violations of the Voting Rights Act inside the polling places would go unseen and unchecked.

Federal observers have special access to polling places under the authority of the Voting Rights Act even where access to Justice Department attorneys is otherwise barred. Federal observers thus become the attorneys' eyes and ears. The discriminatory treatment of racial and minority language voters witnessed by the federal observers, as discussed in detail below, runs the gamut from actions that make those voters feel uncomfortable by talking rudely to them, or ridiculing their need for assistance in casting their ballot, to actions that bar them from voting, such as failing to find their names on the lists of registered voters and refusing to allow them to vote on provisional ballots, or misdirecting them to other polling places.

Minority language voters suffer additional discriminatory treatment when people who speak only English are assigned as polling place workers in areas populated by minority language voters. The polling place workers fail to communicate the voting rules and procedures to the voters, or fail to respond to the voters' questions. In some instances, qualified registered voters have been told that they are not permitted to vote because they have not furnished necessary information, such as their address, even when they have provided the information; the poll worker was unable to understand what the voters were saying, but a speaker of the minority language would have understood.

Civil Rights Division lawyers who receive facts from federal observers about violations of the Voting Rights Act provide those facts directly to the election officials in the jurisdictions involved, allowing them to take corrective action in compliance with the Act. In other instances, those facts are used to secure court orders requiring that the jurisdictions involved to comply with the dictates of the Voting Rights Act. In either approach, the end result fulfills the goal of the Voting Rights Act to allow United States citizens to cast their ballots on election day freely and fairly, without distinction because of their race or membership in a language minority group.

That the work of the federal observers is a part of a law enforcement effort—the enforcement of the Voting Rights Act—is especially true where the information from the federal observers is provided in the context of a lawsuit, where a court has certified a county that was not specially covered under the Voting Rights Act. In that situation, the information is given to the court and affects the position of the parties (the Justice Department and the county) with respect to the actions the jurisdiction must take to comply with the Act (the relief that is ordered in the case). Some local election officials have come to welcome the information obtained by federal observers as an additional source showing the extent to which the county's polling place officials are complying with the provisions of the Voting Rights Act.

However, the initial assignment of federal observers to a county today remains dependant on the certification of the county for the assignment of federal examiners even though federal examiners are largely unnecessary any more for listing voter applicants. There has been no federal listing of voters since the 1970s, apart from an isolated flurry of voter listing in Georgia in 1982 and another isolated flurry in Mississippi in 1983. Discriminatory actions against racial and language minority group members are not

caused by their status as federally registered voters. And examiners no longer receive complaints on election day with respect to federally listed voters. I do not recall any complaints that were received centering on mistreatment of federally listed voters over the last 20 years of my supervision of the federal observer and examiner programs, and few, if any such complaints before that. (Complaints about other matters are made to the examiner, but they routinely involve matters for which the federal observers have been assigned to the county, and are just as easily, and more effectively fielded by the federal observer captain in the county.) Moreover, the enforcement of the Voting Rights Act and the enactment of new easy voter registration laws, such as the National Voter Registration Act (the motor voter law), have made the possibility of future listings by federal examiners highly unlikely.

Further, the Office of Personnel Management must continue to keep the lists of federally listed voters up to date regarding changes of name, changes of address and, as the years have gone by, of deaths. Those voters cannot be removed from the voter rolls without the approval of the Office of Personnel Management, and the lists continued to be provided for election day use by those counties where there are federally listed voters. In fact, these lists are no longer used for any practical purpose, and their maintenance should be discontinued.

It is possible that federal examiners may be needed in the future for voter listing in a situation where the dictates of the Voting Rights Act are met, so the Voting Rights Act's authorization for federal examiners to conduct listing activity should be retained. But there is no reason to continue to tie the assignment of federal observers to the appointment of a federal examiner. I believe that, apart from the possible need for listing voters, the federal examiner provisions are outdated and are no longer needed in the Voting Rights Act, especially the requirement that an examiner be appointed as a prerequisite for the assignment of federal observers to a county.

But the procedure for the certification of a county for federal examiners under Section 6 of the Act serves an important purpose: it requires the Justice Department to conduct an intensive investigation to support the certification, and thus makes the federal government responsible for taking action regarding local election procedures only on the basis of complete and compelling facts. I believe that some manner of certification should remain a prerequisite for the initial assignment of federal observers to a county and, once certified, that a county would remain certified, as is now the case, until it acted to eliminate the certification (the formula under Section 13 for terminating certification would be changed).

If such a new certification procedure would be instituted, the requirement that the United States Attorney General personally must sign the certification, as is now the case, would be unnecessary. This authority for executing a certification should be allowed to be delegated to the Assistant Attorney General for Civil Rights. To my recollection, the Attorney General has signed every certification that has been recommended by the Assistant Attorney General for Civil Rights. Nor would the Attorney General's signature be needed any more to assure the importance of the certification if the only consequence

of a certification would be simply to allow federal observers to witness polling place procedures. The delegation to the Assistant Attorney General for Civil Rights of the responsibility for a certifying a county for the presence of federal observers would be similar to the delegation of authority to the Assistant Attorney General to object to changes in voting practices and procedures under Section 5 of the Voting Rights Act.

The purpose of the present requirement in the Voting Rights Act that the Attorney General's certification of a county be published in the Federal Register is to give notice of the location of the federal examiner's office. Since it no longer will be necessary to have an office for a federal examiner when federal observers are assigned, the publication of the location of that office also will be unnecessary. Those who will most need to know of the assignment of federal observers—county officials and minority group representatives—always are informed personally by Civil Rights Division attorneys, and other members of the community easily learn of the observers' presence from Division attorneys, local press reporting and word of mouth.

Accordingly, I believe that the federal observer provision is still necessary to the enforcement of the Voting Rights Act, but the Voting Rights Act no longer should tie the assignment of federal observers to the appointment of a federal examiner. The Act should allow a certification function, newly directed only to the assignment of federal observers, to be delegated to the Assistant Attorney General for Civil Rights. The requirement for publication of the certification in the Federal Register—an adjunct of the federal examiner function—should be eliminated as a prerequisite to the initial assignment of federal observers.

**Federal observers' work should continue to be a law enforcement function.**

I also recommend that the function of the federal observers remain as it is: as witnesses in a law enforcement function. The question arises because, since my retirement, I have been an observer four times in other countries as a part of an international observer corps assembled by the Organization for Security and Cooperation in Europe (OSEC) under its Office for Democratic Institutions and Human Rights (ODIHR). The forms these observers use list polling place procedures and have a place for the observer's rating from good to bad (1 to 3, or 1 to 5) for each procedure. There are separate forms for the opening of the polls, for voting during the day, and for the closing of the polls. A fourth form allows for fuller explanation of any item or event.

The object of the observation by ODIHR is to report information for public consumption as quickly as possible. During election day the observers send their forms to ODIHR headquarters in the country's capitol at mid-morning, shortly after noon, and just before the polls close; the remaining forms are dropped off when the observers return from the vote count to their regional lodging sites throughout the country. This way, by the afternoon of election day OSCE/ODHIR knows how the election is going, whether there are serious problems, and if so, what they are and where they are. Then, on the morning after the election, OSCE issues its judgment on whether the election was conducted according to international standards or was marred by irregularities.

But OSCE is not a law enforcement organization, and its approach would not be appropriate to the job of the Justice Department. Some of the irregularities that the federal observers can witness are not dissimilar from the kind of procedural irregularities that are common to elections held in emerging democracies. The extra identification steps required of Arab Americans in Hamtramck, Michigan, and the harassment they encountered, described below, are an example. But the similarity of some situations to those addressed by international observer groups such as the OSCE does not argue for redesigning the federal observer program under the Voting Rights Act to resemble those organizations' efforts.

In fact, the federal observer program is an effective law enforcement program as it is now constituted. If observers are desired to watch polling place activities for other purposes, those functions should be performed by other observers serving other functions. "Domestic" observers in other countries are allowed into the polling places to get information for their candidates, or political parties, or organizations, and routinely publicize the activities they witness. Those countries' elections, however, are conducted centrally, by a central (in the U.S. it would be a federal) election commission, and the observers' activities are under that central control. The laws of those countries specifically allow domestic as well as international observers into the polling places. The observers are granted permission to be in the polls and are issued identification tags for that purpose by the central or district election commissions, which can withdraw that permission at any time.

This kind of observation is not a matter within the purview of existing federal legislation in this country, and to have federal legislation allowing these kinds of observers in polling places a record would have to be established by the United States Congress justifying their presence in connection with federal elections. On the other hand, in the United States access to the polling places is controlled by state law, and some states allow such observers into the polling places now. States routinely also allow the press into the polls to witness the activities there. Finally, redacted versions of the federal observers' report forms may be obtained under the Freedom of Information Act (FOIA) subject to the FOIA rules and the Privacy Act.

The following analysis provides the specific support for my conclusion that the federal observer provision of the Voting Rights Act should be continued because it is clearly needed to provide the Justice Department with evidence of violations of the Voting Rights Act's prohibitions against discrimination in the polling places against racial and language minority group members. This analysis is taken from an article my wife and I wrote for the Temple Political and Civil Rights Law Review, Spring 2002 edition, Vol. 2, Number 11.

**The special provisions of the Voting Rights Act were compelled by resistance to African Americans' voting rights.**

> Congress had found that case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting, because of the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered in these lawsuits. After enduring nearly a century of systematic resistance to the Fifteenth Amendment, Congress might well decide to shift the advantage of time and inertia from the perpetrators of the evil to its victims.

*South Carolina v. Katzenbach*, supra at 328.

The Voting Rights Act (the "Act") cut through the protective barrier of federalism with two important sections. Section 5 of the Act, 42 U.S.C. § 1973c (the "preclearance" provision), required federal review of any new voting procedures that states and counties might adopt. This prohibited the adoption of new discriminatory practices when a jurisdiction's present practices were found to be unlawful. And Section 4 of the Act, 42 U.S.C. § 1973b, instantly led to the enfranchisement of thousands of people by suspending the use of literacy tests and similar discriminatorily applied barriers to the registration of African Americans in the Deep South.[1] Some states, such as Virginia, immediately stopped using literacy tests. In other Southern states, federal examiners were appointed under Section 6 of the Act, 42 U.S.C. § 1973d, assigned to counties to conduct fair voter registration under Section 7 of the Act, 42 U.S.C. § 1973e, when white county officials refused to stop their racially discriminatory voter registration practices.[2] This was no small task, as over 170,000 people were registered between 1965 and 1972 through the efforts of the federal examiners, mostly in Alabama, Georgia, Louisiana, and Mississippi. *Semiannual Report of Cumulative Totals on Voting Rights Examining as of*

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[1] These "tests or devices" were suspended in states and counties determined by a formula in Section 4 of the Voting Rights Act, 42 U.S.C. § 1973b, based on the use of literacy tests and other pre-application devices (such as having current voters vouch for your good moral character), and low voter turnout. Later, this provision was made permanent and nationwide. 42 U.S.C. § 1973aa. Originally, states and counties covered under the formula in Section 4 of the Act could terminate their special coverage ("bail out") after five years by showing in a lawsuit before a three-judge court in the federal district court for the District of Columbia, that no test or device had been used to deprive anyone of the right to vote during that period. Since the Act itself suspended those tests or devices for only 5 years, it was thought that it would be relatively simple for states and counties who complied with the suspension to bail out after the 5-year period. In 1970 the time period in Section 4 was extended to 10 years, in 1975 it was extended to 17 years. In 1982 the approach was changed, and the special coverage under Section 4 will expire 25 years after August 5, 1984, the effective date of the 1982 Amendments, 42 U.S.C. § 1973b(a)(8). In 1982 the bail-out provisions were amended substantially to allow individual counties within a fully covered state to bail out, and to set out a number of specific qualifications that a jurisdiction needs to meet in order to bail out. 42 U.S.C. § 1973b(a)(1)-(3).

[2] The examiners are commonly referred to as federal registrars. These were people appointed by the head of the Civil Service Commission, now the Office of Personnel Management, to examine voter applicants as to their qualifications under state law. If the applicants satisfied the state requirements, their names were put on a list that was given to the county registrar, who then had to add them to the county voter registration rolls. In this way, some semblance of state authority over the voter registration process was preserved: registrants satisfied state requirements, and a state-authorized official put the voters' names on the rolls. 42 U.S.C. § 1973e(b). To safeguard against discriminatory purges of those newly enfranchised voters, their names cannot be purged from the voter rolls without the approval of the Office of Personnel Management. 42 U.S.C. § 1973e(d).

*December 31, 2000, Prepared by the Office of Workforce Information, Office of Merit Systems Oversight and Effectiveness, U.S. Office of Personnel Management*. *See* Appendix A for the number of people, by state, registered by federal examiners.

Further, in order to allow the U.S. Attorney General to know whether discriminatory action was taken against the newly enfranchised voters in the polling places on election day, Section 8 of the Act allowed that, whenever an examiner has been appointed,

> [T]he Director of Personnel Management may assign, at the request of the Attorney General, one or more persons, who may be officers of the United States, (1) to enter and attend at any place for holding an election…for the purpose of observing whether persons who are entitled to vote are being permitted to vote, and (2) to enter and attend at any place for tabulating the votes cast at any election…for the purpose of observing whether votes cast by persons entitled to vote are being properly tabulated.

42 U.S.C. § 1973f.

Thus, the use of federal observers in polling places initially was directed at protecting the rights of new voters who had been registered by federal examiners. Even though federal voter registration was rare after 1972, the predicate under the Voting Rights Act for assigning federal observers has not changed: federal observers continued to be allowed only in counties that had been certified by the U.S. Attorney General for federal examiners. As a result, to allow the assignment of federal observers to a county, the county had to be certified by the U.S. Attorney General or a federal court (under Section 3(c) of the Act, 42 U.S.C. § 1973a(c)) for federal examiners.[3] The assignment of federal observers continues to be a cornerstone of the enforcement of the Voting Rights Act. Over 23,000 federal observers have been assigned to monitor polling place procedures since 1966, 4,393 since 1990 alone.[4] See Appendix B, Assignment of Federal Observers Under Section 8 of the Voting Rights Act, 42 U.S.C. § 1973f, by Year and State.

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[3] Since the federal examiner and federal observer provisions of the Voting Rights Act focus on political subdivisions, which ordinarily are counties, a county must be certified for federal examiners even if the object is to assign federal observers to monitor polling places during a city or other election, such as a school board election, within the county. See 42 U.S.C. §§ 1973d, l(c)(2).

[4] There were 4,698 federal observers assigned to polling places in 5 states from 1966 through 1969; 7,034 federal observers were assigned to 9 states in the 1970s; 6,598 federal observers were assigned to 11 states in the 1980s, and 3,753 federal observers were assigned to 13 states in the 1990s. In 2000, 640 federal observers were assigned to 11 states. See, Appendix B.

**Federal observers witnessed clear racial discrimination at the polls.**

Federal observers were able to note and document a wide variety of discriminatory actions that were taken against African Americans in the polls. Some of these actions were insulting and direct, as are reflected in the United States' responses to interrogatories in *United States v. Conecuh County, Alabama*, Civil Action No. 83-1201-H (S.D. Ala., Jun 12, 1984). [5] See Appendix C.

> While providing assistance to a black voter, white poll official Albrest asked, "Do you want to vote for white or niggers?" The voter stated that he wanted to give everyone a fair chance. Albrest proceeded to point out the black candidates and, with respect to one white candidate, stated, "This is who the blacks are voting for." Poll official Albrest made further reference to black citizens as "niggers" in the presence of federal observers, including a statement that "niggers don't have principle enough to vote and they shouldn't be allowed. The government lets them do anything."

Plaintiff's Response to Interrogatories and Request for Production of Documents, p. 6.

White poll workers treated African American voters very differently from the respectful, helpful way in which they treated white voters. When questions arose about the voter registration data for a white person, such as a person's address or date of registration, or when a white person's name was not immediately found on the poll books, the voter was addressed as Mister or Misses, was treated with respect, and the matter was resolved on the spot. If the voter's name was not found, often he or she either was allowed to vote anyway, with his or her name added to the poll book, or the person was allowed to vote a provisional or challenged ballot, which would be counted later if the person were found to be properly registered. If, however, the voter was black, the voter was addressed by his or her first name and either was sent away from the polls without voting, or told to stand aside until the white people in line had voted. African American voters were not allowed to take sample ballots into the polls, and were made to vote without those aids (it was claimed by white officials that the sample ballots were campaign material which was prohibited inside the polls).

African American voters who were unable to read and write, due in large part to inferior segregated schools and the need to go to work in the fields at an early age, were refused their request to have someone help them mark their ballot, notwithstanding the Voting Rights Act's bar on literacy tests. In some instances, white poll workers would loudly announce the African American voter's inability to read or write, embarrassing the

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[5] The federal observers' reports are not public documents, so there are very few examples on the public record of the facts that the observers have witnessed. One such public document is the Plaintiff's Response to Interrogatories and Request for Production of Documents in *United States v. Conecuh County, Alabama*, supra. Some of the specific examples of the kind of discriminatory treatment that was afforded African American voters described in the text that follows are taken from the excerpts of the *Conecuh County* responses at Appendix C, while others are based on the author's first-hand knowledge.

voter in front of his or her neighbors. Some white poll workers went so far as to bring a magnifying glass to the polls, and give it to African American voters, challenging the voter to read using the magnifying glass in front of everyone present at the polling place. Illiterate white voters, on the other hand, were allowed assistance by a person of their choice without comment. White couples routinely were allowed to enter the voting booth together to mark their ballots.

In instances where African American voters were allowed an assistor in the booth, arbitrary rules were concocted that limited the number of voters an assistor could help, or made the assistor wait outside the polling place, requiring the voter to enter the polls alone and negotiate alone the sign-in procedures administered by unfriendly white poll workers, before being allowed to ask that the assistor be allowed to help.[6] All too often, when the voter said he or she needed assistance the white poll worker would proceed to help the voter, and not give the voter a chance to ask for the assistor the voter wanted; the voter did not know if the poll worker cast the ballot as the voter desired, and had no confidence that the ballot was cast correctly.

Moreover, racial discrimination in the polls is not limited to African Americans, and is not limited to the South. On November 2, 1999, in the City of Hamtramck, Michigan, the qualifications of more than 40 voters were challenged on grounds that they were not citizens. They were challenged by members of a group known as Citizens for a Better Hamtramck (CCBH), organized to keep elections pure. As described in the Consent Order and Decree in *United States v. City of Hamtramck*, Civil Action No. 00-73541 (E.D. Mich, Aug 7, 2000),

> 6. …Some voters were challenged before they signed their applications to vote. Other voters were challenged after they had signed their applications and their names had been announced. The challenged voters had dark skin and distinctly Arabic names, such as Mohamed, Ahmed, and Ali. The challengers did not appear to possess or consult any papers or lists to determine whom to challenge.
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> 7. Once challenged, the city election inspectors required the challenged voters to swear that they were American citizens before permitting them to vote. Voters who were not challenged were not required to do so. The city election inspectors did not evaluate the propriety of merit of the challenges. Some dark-skinned voters produced their American passports to identify themselves to election officials. Nevertheless, these persons were challenged by CCBH, and the election inspectors required them to take a citizenship oath as a prerequisite to

[6] After the Voting Rights Act enabled African Americans in the Deep South to register to vote, it became common for civil rights workers and local African American residents to drive the new voters to the polls and to give assistance to those who needed it. This was a natural outgrowth of the organizing required during the civil rights movement to achieve voter registration for black people. It provided transportation—many people did not have cars—and gave confidence and protection to these newly enfranchised voters at the polling places from which they had so recently been excluded by white poll workers and voters who did not want them there. This tradition of "hauling" voters to the polls and giving assistance to voters who need it continues today, especially in many rural areas.

> voting. No white voters were challenged for citizenship. No white voters were required to take a citizenship oath prior to voting.

at p. 4.

The consent decree also states that city officials were apprised of the incidents, that they consulted with state election officials who were present in Hamtramck on election day, but neither the state nor the city election officials prevented the baseless challenges from continuing. It was claimed that other Arab-American citizens may have heard about the incidents and decided not to go to the polls to vote that day.

**Federal observers witnessed clear discrimination against language minority group members at the polls.**

Besides discriminatory treatment of citizens based on race, citizens who speak English poorly, or not at all, have faced obstacles to voter registration and voting. In 1975 Congress took note of discrimination against people who have only a limited ability to speak English. For them, printing or providing information only in English as effective as a literacy test in keeping them from registering to vote or casting an effective ballot. Such disenfranchisement was outlawed when the Voting Rights Act was amended and expanded in 1975. The terms of Section 4 of the Act, containing the formula for applying special coverage to counties, were changed to include among prohibited tests and devices,

> [T]he practice or requirement by which any State or political subdivision provided any registration or voting notices, forms, instructions, assistance or other material or information relating to the electoral process, including ballots, only in the English language, where the Director of the Census determines that more than five per centum of the citizens of voting age residing in such State or political subdivision are members of a single language minority.

42 U.S.C. § 1973b(f)(3). Language minorities are defined in the Voting Rights Act as American Indian, Asian American, Alaskan Natives, and people of Spanish heritage. 42 U.S.C. § 1973l(c)(3). Political subdivisions as defined in the Act usually are counties. 42 U.S.C. § 1973l(c)(2).[7]

The 1975 amendments to the Act required that when the newly covered jurisdiction

> …provides any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, it shall provide them in the language of the applicable language minority group as well as in the English language…

[7] The jurisdictions subject to the special provisions of the Voting Rights Act are listed in the Appendix to 28 U.S.C. Part 51.

42 U.S.C. § 1973b(f)(4)[8]

Counties in Arizona, New Mexico and Utah were certified for federal examiners, and federal observers were assigned to document the extent to which the English language was used in areas where many of the voters spoke Native American languages but understood English only marginally. Similarly, federal observers have been assigned to polling places in Spanish language areas of Arizona, Texas, New Jersey and New York City, and Chinese language areas of New York City, and San Francisco and Oakland, California.[9] In all these areas minority language citizens were allowed to register to vote, but the use of the English language instead of the voters' first language prevented them from understanding the voting instructions and the ballot. Polling place workers either were not able to speak the language of the voters, or if they could, were not trained to translate the documents and procedures into the language of the voters. By the 1990s federal observers were assigned to monitor discrimination against language minority group members in numbers equal to the federal observers assigned to monitor non-language racial discrimination.[10]

The need for the language minority provisions of the Voting Right Act continues to be demonstrated in areas of the country where English is not persons' primary language. Normally one would assume that polling place workers would be chosen from the population where the polling place is located, and that they would speak another language in addition to English with the same frequency as the voters. In many instances, however, this did not happen. For example, in ethnically changing neighborhoods in New York City, the choices of the political party apparatus resulted in the repeated appointment of English-speaking poll workers where a large portion of the new voters in a precinct were Spanish-speaking Puerto Ricans. In Passaic, New Jersey, English-speaking poll workers were unable to find the names of Spanish-speaking voters

[8] A parallel requirement was added in Section 203 of the Voting Rights Act in 1975 for counties determined by different formula. 42 U.S.C. § 1973aa-1a. Section 203 of the Act does not include the other special provisions of Section 4, such as the preclearance, federal examiner and federal observer provisions. Lawsuits under Section 203 must be brought before a three-judge court. As a result of amendments since 1975, coverage under Section 203 now applies to counties that have more than 5 percent of voting age citizens who are members of a single language minority and are limited-English proficient; have more than 10,000 voting age citizens who are members of a single language minority and are limited-English proficient; or have a part of an Indian reservation, and more than 5 percent of the American Indian or Alaska Native voting age citizens are members of a single language minority and are limited-English proficient; and the illiteracy rate of the language minority group citizens is higher than the national illiteracy rate. 42 U.S.C. § 1973aa-1(a)(2). The counties covered under the language minority provisions of Sections 4 and 203 are listed in the Appendix to 28 U.S.C. Part 55.

[9] Counties in Arizona, New York and Texas were certified by the U.S. Attorney General. Counties in California, New Mexico and Utah were certified by federal district courts under Section 3(c) of the Act, 42 U.S.C. § 1973a(c). Section 3(c) provides for certification in a lawsuit brought "under any statute to enforce the voting guarantees of the fourteenth or fifteenth amendment…(1) as part of any interlocutory order…or (2) as part of any final judgment if the court finds that violations of the fourteenth or fifteenth amendment justifying equitable relief have occurred..."

[10] From 1990 through 2000, there were 2,449 federal observers assigned to elections in the states of the Deep South, very few of which involved discrimination against language minority group members, and there were 2,215 federal observers assigned to monitor elections in other areas of the country, most of which involved discrimination against language minority group members. *See* Appendix B.

in the polls books because the poll workers did not know that the voters' family name traditionally was the second of three names they used. Some voters were denied the ballot because they identified their street name according to common Spanish usage rather than the formal English name.[11] In Texas and Southern Arizona polling places Hispanic voters were admonished not to use Spanish when talking in the polling places and when giving assistance to voters who needed help when voting. Moreover, the citizenship of Hispanic voters was questioned at the polls, with voters being required to somehow provide on-the-spot evidence of their citizenship before being given a ballot; such evidence was not required of Anglo voters.[12]

Evidence of other kinds of discriminatory behavior of polling place workers and others toward Spanish language voters inside the polls is provided in the reports of the Independent Elections Monitor appointed in September 2000 by the court in a consent decree in *United States v. Passaic City, New Jersey, and Passaic County, New Jersey*, Civil Action No. 99-2544 (NHP) (D.N.J., Sep. 5, 2000)(three-judge court).

> At P.S. 6, observers called to report that the challenger was making racist remarks about Hispanics. At the Ukrainian school, challengers became very aggressive and were yelling at voters, stating that they did not live in the country and should not vote. Ironically, many of these challenged voters were off-duty Passaic City police officers. Angel Casabona, Jr. was one such challenged police officer who avoided confrontation and properly came to Passaic City Hall to have his voting status clarified. Escorted by the City Clerk and investigators from the prosecutor's office, Mr. Casabona reentered the polling site and was permitted to exercise his vote. The brazen challenger was reprimanded and board workers were reminded that challengers should not be interacting with voters.

Walter F. Timpone, Office of the Election Monitor, Fifth Report, June 15, 2001, pgs. 3-4.

> The most disturbing incident of the [June 26, 2001 municipal primary election] occurred at the polling place at St. Mary's School in Passaic. Someone allegedly stole the flag from outside the polling place. The police were called. An officer responded and caught the purported perpetrator. The Officer entered the polling place and asked who had called the police. No one responded. The officer barked comments in substance to the poll workers as follows, "Can't you read? What country do you come from?" When a municipal worker of Indian origin came to see what the problem was, the officer then asked, "And what country do you come from?" When a Latino federal observer tried to explain the

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[11] Mail addressed to streets using the Spanish nickname was delivered because the postal personnel were familiar with the local Spanish language usages, as the poll workers were not.

[12] Anglo candidates compiled lists of Hispanic voters' names for their poll watchers to challenge at the polls on the ground that the voters were not citizens. United States citizenship is required by every state as a qualification to register to vote in state and federal elections. But in order to avoid discriminatory treatment of voters at the polls and disrupting the polling places with election-day challenges, persons who, before an election, have evidence that a registered voter is not a U.S. citizen should be required to present that information to the voter registrar, and to desist from interposing challenges at the polls to voters whose qualifications have been upheld by the register.

> dictates of the consent decree, the officer asked for credentials. When the observer showed his credentials, the officer found them inadequate because they lacked a picture and detained the observer. The Officer told the observer, "I could arrest you for this." Upon being alerted to the controversy, I asked investigators from the Passaic County Prosecutors Office and Deputy Chief of the Passaic County Police Department to intercede. When a Sergeant from the Passaic Police department responded at the scene and learned what had happened, he apologized to the federal observer and told him he thought some sensitivity training might be in order for the officer. Notably, this discriminatory behavior took place in a city where the Latino population is at 62%. Intolerance in the city is still existent and hiding under color of official right.

Walter F. Timpone, Office of the Election Monitor, Sixth Report, July 27, 2001, pp. 6-7.

The use of English rather than Chinese in polling places in Chinese neighborhoods of San Francisco and Oakland (Alameda County), California, and New York City left voters confused about procedures, and ignorant of ballot propositions and contested offices. As was noted in the Settlement Agreement and Order in *United States v. Alameda County, California,* C95 1266 (N.D. Cal, Jan 22, 1996)(three-judge court),

> According to the 1990 Census, the population of Alameda County includes 68,184 Chinese Americans and 30,120 Chinese American citizens of voting age. The 1990 Census reports that 11,394 persons, or 37.83 percent of the Chinese citizen voting age population in Alameda County, and 1.3 percent of the total citizen voting age population in Alameda County do not speak English well enough to participate effectively in English language elections. Thus, over 11,000 Chinese American citizens in Alameda County cannot function effectively in the electoral process except in the Chinese language.

at p. 4.

Problems were compounded in Native American areas of Arizona, New Mexico and Utah. The problems faced by Native Americans in these areas are illustrated in Cibola County, New Mexico, which contains the Ramah Chapter of the Navajo Reservation and the Acoma and Laguna Pueblos. The Stipulation and Order in *United States v. Cibola County, New Mexico,* No. Civ 93 1134 LH/LFG, (D.N.M., Apr 21, 1994)(three-judge court), states that,

> 5. According to the 1990 Census, 57.8 percent of the Navajo voting age population and 18.1 percent of the Pueblo voting age population in Cibola County do not speak English well enough to participate effectively in English language elections. Thus, a significant proportion of the Native American population of Cibola County, and a significant majority of Navajos, cannot function in the electoral process except in the Navajo or Keresan languages.

> 6. The Navajo and Keres populations of Cibola County live in circumstances of significant isolation from the non-Native American population of the county. Cibola County is unusually large in physical terms, and covers a geographic area roughly the size of the State of Connecticut. Over four-fifths of the non-Native American population lives clustered within or near the adjacent incorporated communities of Grants and Milan, close to the county courthouse. The Acoma and Laguna population centers are between 25 and 50 miles away from Grants, the county seat, while the Ramah Chapter House is approximately 50 miles from Grants. The isolation of the Native American population of Cibola County burdens their access to the franchise.
>
> 8. Native American citizens living within Cibola County, suffer from a history of discrimination touching their right to register, to vote, and otherwise to participate in the political process. Until 1948, Native American citizens of New Mexico were not permitted to vote in state and local elections. Trujillo. V. Garley, C.A. No. 1350 (D.N.M., August 11, 1948). In 1984, the court in Sanchez v. King, C.A. No. 82-0067-M (D.N.M. 1984) held that the New Mexico state legislative redistricting plan discriminated against Native Americans.
>
> 9. The level of political participation by Native American citizens of Cibola County is depressed. Voter registration rates in the predominantly Native American precincts have been less than half the rate in non-Native American precincts, and Native Americans are affected disproportionately by voter purge procedures. Although Native Americans comprise over 38 percent of the county population, fewer than eight percent of all absentee ballots have been from the predominantly Native American precincts. There is a need for election information in the Navajo and Keresan languages, and a need for publicity concerning all phases of the election process for voters in Ramah, Acoma and Laguna. The rate of participation by Native Americans on such issues is less than one third of the participation rate among non-Native Americans. There is a need for polling places staffed with trained translators conveniently situated for the Native American population.

at pages 5-7.

The remedy for this unlawful disparity is complicated by the facts that (1) the Navajo and Pueblo languages are oral, not written, and (2) there are no equivalent terms in the Navajo and Pueblo languages for many words and phrases in the election process.

Native American polling place workers in reservation precincts faced a more difficult task than white poll workers in getting to the training session for poll workers that were held many miles away in county seats where most white people lived. At the training sessions Native American poll workers were given little or no instruction about how to translate ballots and propositions, and many of their attempts to do so on election day resulted in the most rudimentary references. For example, poll workers assisting voters at the polls would refer to the office of secretary of state as someone who works in

the state capitol, and bond levies for education were said simply to be increases in taxes. Many times the Native American poll workers found it so difficult to figure out how to explain items on the ballot they just instructed the voters to skip the offices or propositions. Moreover, Native American voters who had been purged from the voter rolls because they failed to respond to written notices they either did not receive[13] or did not understand, were turned away from the polls with no explanation of why they were not able to vote, and were given no opportunity to re-register there.[14]

**Pre-election investigation can pinpoint where federal observers should be assigned.**

The task of assuring compliance by polling place workers with appropriate polling place procedures requires (1) knowledge of what is happening in the polling places, and (2) the authority to correct actions that are in violation of the prescribed procedures. For over 35 years DOJ has been determining, before each election, what will happen in specific polling places in particular counties in states far from Washington, D.C. Based on this information DOJ determined at which polling places discriminatory activity would take place, and the exact number of federal observers needed at each particular polling place, from among the hundreds of counties in the 16 states that are fully or partially covered under Section 4 of the Voting Rights Act, [15] and the 10 additional jurisdictions in other states that have been and remain certified by courts under Section 3 of the Act.[16]

This DOJ effort, known as a pre-election survey, is conducted by the Voting Section of DOJ's Civil Rights Division. Pre-election surveys began right after the Voting Rights Act was enacted, as a tool for determining where and how many federal observers would need to be assigned under Section 8 of the Voting Rights Act. Through the years

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[13] Residences on the Navajo reservation often are miles apart, with no paved roads, and many homes have no telephones. It is not unusual for reservation residents to pick up their mail periodically at a store or other place far from their homes.

[14] Voters were confused because they voted in tribal elections without problem, and were not told, for example, that under state law they had been purged from the county voter rolls because they did not vote with some particular frequency and in particular elections, such as every two or four years in general elections. To add to the confusion, in many areas the tribal elections and the state elections were held on different dates but at the same locations. Prior to the National Voter Registration Act, 42 U.S.C. § 1973gg et seq., voter registration in many counties in Indian country was conducted in the county seat, far from reservation housing, until, in some instances, litigation required that deputy registrars be made available at reservation sites, and that voter purge procedures be modified to allow fair notice to Native American voters. *United States v. State of Arizona*, CIV 88-1989 PHX EHC (D. Ariz., May 22, 1989), pgs. 6-11; First Amended Consent Decree, Jan. 3, 1994, pgs. 5-10.

[15] Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina and Texas are fully covered under the Voting Rights Act's special provisions by the formula in Section 4 of the Act, 42 U.S.C. § 1973b. One or more counties are specially covered under Section 4 in California, Florida, Michigan, New Hampshire, New York, North Carolina, South Dakota and Virginia. All jurisdictions covered under Section 4 of the Act are listed in the Appendix to 28 CFR Part 55.

[16] Certification under Section 3(a) of the Voting Rights Act, 42 U.S.C. § 1973b(a), is for a particular term as defined by the court. Certification by the U.S. Attorney General under Section 6 of the Voting Rights Act, 42 U.S.C. § 1973f, is for an unlimited time. Jurisdictions certified under Section 6 can seek to have their certification terminated under Section 13 of the Voting Rights Act, 42 U.S.C. § 1973k. Appendix D is a list of the jurisdictions that have been certified for examiners by court order under Section 3(a) of the Act.

the pre-election surveys have remained relatively unchanged for determining where racially discriminatory actions (as contrasted with language-based difficulties) would occur in the polling places of the Deep South. This process is instructive on a broad level because it can be used, with variations, by states throughout the country to determine, prior to election day, where problems will occur on election day in polling places across the state.

The DOJ focus during the pre-election surveys is to find circumstances that are likely to lead to actions that will disadvantage voters in the polls on election day. To allow black voters to vote without interference in the South, the Voting Section focuses on counties where black candidates are facing white candidates. Those are the circumstances where experience has shown that polling place workers are more apt to take actions that deprive African American of their right to vote. Moreover, the inclination of polling place workers to take discriminatory action against African American voters is more likely when the black candidates have a real chance of beating white opponents. (For concerns about other kinds of problems at the polls, the pre-election survey would focus on the facts and antipathies relating to those problems.)

The surveys consist of two rounds of telephone calls and a field investigation. The first round of phone calls begins about six weeks before the election, which is a time when candidate qualifying has been completed and campaigning has been in progress. The Voting Section contacts the election director in each county where the minority population is about 20% or more, since a relatively small but concentrated portion of a county's population can be a significant proportion of a single election district in a county. The Voting Section determines a number of facts from each county election official they contact, including the name and race of the candidates, the office each is contesting, which candidates are incumbents, the county's procedures for appointing polling place workers, and the county's procedures for responding to problems that arise on election day. The second round of telephone calls is made to at least two African American people in each county who are familiar with the way elections have been conducted in the county during recent elections, who know who the candidates are and how the candidates have been conducting their campaigns, and who are knowledgeable about relationships between the races in the county and whether there have been any recent racial incidents in the county.

Voting Section attorneys then travel to the counties where the facts from the two rounds of telephone calls indicate that the assignment of federal observers is needed because poll workers will make it difficult for black voters to cast their ballots for the candidates of their choice. The attorneys interview the county election officials, the county sheriff (or chief of police, if a city election is in issue), African American county residents, including people associated with community and civil rights organizations, and candidates. The attorneys relay their information and their recommendation as to whether federal observers should be assigned for the election, and, if so, number and placement of federal observers that will be needed on election day, to a Voting Section

supervisor who coordinates the survey. [17] The polling places that are selected for the assignment of observers are (1) those at which the facts show that African American voters are likely to be victimized on election day, where (2) the county has no effective way to either know what is happening in the polls, or for responding to problems that occur at the polls, or both.

During the pre-election surveys the Voting Section supervising attorney talks frequently with the Voting Rights Coordinator at the Office of Personnel Management (OPM) who recruits and supervises the people who serve as observers.[18] Thus, OPM is aware of the identity of the counties that are the subject of field investigations, and of the recommendations of the attorneys for the assignment, numbers and poll location of federal observers. Because of the ongoing coordination between the Voting Section and OPM, the federal observers are chosen and are ready to depart for their assigned location the moment a final decision is made by the Assistant Attorney General for Civil Rights as to the numbers and placement of the observers.[19]

**Information from federal observers is obtained quickly and effectively on election day.**

The pre-election process not only gives DOJ information it needs to determine where and how many federal observers will be needed on election day, it puts DOJ lawyers in contact with county election officials before the election, and the DOJ lawyers inform the county officials of the problems that DOJ has found out may occur in the county's polls on election day. This contact continues during the election, as the DOJ lawyers provide the county election officials with information the lawyers get from the observers.

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[17] The Voting Section is headed by a chief and four deputy chiefs. There also are special counsels who are senior attorneys assigned to perform particular duties. The pre-election work for a particular jurisdiction is overseen by a deputy chief if the jurisdiction is a defendant in recent litigation. Otherwise, the pre-election supervision is handled by the special litigation counsel for elections.

[18] Federal observers are assigned and supervised by the Office of Personnel Management. *See* 42 U.S.C. § 1973f. OPM centralized the observer program in the OPM office in Atlanta, Georgia, over the past several years. Beginning in 2002 the program will be centralized in the OPM office in Denver, Colorado.

There is no standing group of people who are federal observers. Rather, the people chosen to serve as federal observers at a particular election are volunteers, usually from among the OPM nationwide staff except when special abilities are required, such as Native American language ability. General training sessions are held for observers and observer supervisors at selected sites during the year. Often people will volunteer to serve as observers in election after election, but they are not always available because of the demands of their regular work assignments and prior obligations. Because of the need to recruit observers for each election, and the logistical requirements of transportation (airplane tickets, rental car) and lodging, the OPM coordinator and the Voting Section supervising attorney are in contact throughout the year to discuss observer needs in upcoming elections.

[19] If a county for which federal observers is recommended has not been certified yet for federal examiners, a separate recommendation for certification of the county is made to the U.S. Attorney General, and a certification form is prepared for the U.S. Attorney General's signature. Also, because certifications are effective upon publication in the Federal Register, 42 U.S.C. § 1973b(b), arrangements are made for publication as soon as possible after the U.S. Attorney General signs the certification. Similar arrangements are made by OPM which must publish in the Federal Register a location for an examiner's office. 42 U.S.C. § 1973e(a).

The observers are briefed by DOJ attorneys and the observer captain on the day before the election. The observers get to their assigned polling place one-half hour before the poll opens, and usually will remain until the last person leaves the poll. They have pre-printed forms on which to record the activity in the polls. Observers usually also attend the ballot count and record the number of votes received by each candidate.

During election day an observer supervisor makes repeated visits to the polling places where federal observers are stationed, and remains in constant telephone contact with the DOJ attorney who is in the county. This gives the DOJ attorney in the county a constant flow of information throughout the day about activities that transpire inside the polls.[20] When the federal observers inform the DOJ attorney of actions of polling place officials that the attorney concludes are interfering with the voting rights of African Americans, the DOJ attorney gives the facts to the local official in charge of the election, which allows him or her to stop the discriminatory activity. Local officials also can use this information after the election to take steps to prevent the incidents from happening again.

Similar steps are taken on election day when federal observers are used to determine compliance with the language minority provisions of the Voting Rights Act, but normally the pre-election preparation is different. The inability or lack of desire of poll workers to provide information to non-English speaking voters usually does not depend on the identity of the candidates or the issues involved in a particular election. Thus, the information obtained in one election will allow a determination of whether federal observers will be needed in the next election.[21]

The reports of these federal observers have their primary emphasis on the language aspects of polling place procedures and the actions of polling place workers. (The federal observers assigned to a particular polling place speak the minority language that is used by the voters at that polling place.) It usually is not important that the observers arrive at the opening of the polls, nor that they stay all day, since the goal is to have the observers attend the polls for a sufficient length of time to witness a number of minority language voters go through the voting process. This will give the observers sufficient facts to allow the DOJ attorneys to analyze the county's compliance with the law.

We should emphasize that the federal observers do not interfere with the election process. Their limited function, to pass along information to their OPM supervisors and

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[20] In addition, the DOJ attorney in each county calls the supervising attorney often during the day: when the polls open, and every hour after that until it is clear that correct procedures are being followed at the polls in that county, unless continuing problems and their resolution make it necessary to continue frequent contact. This coordination between the supervising attorney and the attorney in the field begins on the day before the election, and does not end until the attorney leaves the county to return to Washington, D.C., on the day after the election or later.

[21] Initial facts indicating possible violations of the Voting Rights Act most often come to DOJ through complaints by telephone, by mail, or in conversation with DOJ attorneys, paralegals and analysts in the performance of their routine duties.

the DOJ attorneys, is in accord with the dictates of Section 8 of the Voting Rights Act, 42 U.S.C. § 1973f. The observers must not give instructions to poll workers, must not give help to voters, and must not share their observations, judgments or opinions with individuals in the polls. They are eyes and ears. They are paid witnesses.[22]

**The federal observers' reports allow Justice Department attorneys to require counties to comply with their states' rules.**

In its enforcement of all federal civil rights laws the Department of Justice (DOJ) attempts to obtain voluntary compliance from prospective defendants. This has been especially true of the enforcement of the Voting Rights Act where the prospective defendants are officials of state and local governments.

From the beginning of DOJ's enforcement of the Voting Rights Act DOJ lawyers personally conducted investigations in each county before examiners or observers were assigned, regularly checked on the progress of examiners while voter registration was conducted, and on election day a DOJ attorney was and continues to be present in each county to which federal observers are assigned to obtain information from the observers during election day, and debrief the observers immediately after the election. During their presence in the counties the DOJ lawyers have continuing contact with county officials, and give them the information the lawyers gain as part of their pre-election investigation in the county, and from the federal observers. Those local officials, faced with the immediate and continuing presence of DOJ lawyers, usually instruct the head worker at the polling place to follow the appropriate procedures.

The federal observers inside the polling place witness the cessation of the discriminatory action, or if the discriminatory action continues, the DOJ lawyer again brings the information from the observers to the attention of the county election official to get further corrective action. Thus, federal observers function both to gather evidence of discriminatory activities in the polling place for future legal action, and for the elimination of discriminatory actions on the spot. At times, the mere presence of federal observers at the polls serves to inhibit the tendency of many polling place workers to take discriminatory action against African American voters.

**Court-ordered remedies require counties to do their job in the South.**

Some compulsive action is needed when county election administrators do not address outstanding problems in the polls, and do not follow proper election day procedures. A primary reason for the mistreatment of African American voters was and

[22] It is of utmost importance that observers stick to their role at the polls, because they are able to be in the polling places only by the authority of Section 8 of the Voting Rights Act. 42 U.S.C. § 1973f. States have laws about who can enter the polls. Usually those individuals include poll workers, voters, voters' assistors, peace officers when called, and candidates' or political parties' poll watchers. Others will be inside the polls in violation of law unless specifically authorized to be there by the appropriate local election official. Moreover, under Section 8 of the Voting Rights Act the federal observers are able to be in the polls only to perform the tasks noted above.

continues to be the failure of local election officials to appoint African Americans as polling place workers. The evidence of mistreatment that this discriminatory policy had on African American voters has provided a firm basis for court orders that required the defendants to take specific steps to recruit and hire African Americans to work in the polls. One good example of this result is the consent decree in *United States v. Conecuh County, Alabama*, supra, which required the defendant political party executive committees (responsible for nominating people to serve as poll workers) to "engage in affirmative recruitment efforts aimed at ensuring that the pool of persons from which nominations are made fully reflects the availability of all qualified persons in Conecuh County who are interested in serving as election officials, without regard to their race or color." at pp. 3-4.

Those recruitment efforts were required to include encouraging candidates to "seek out and propose for nomination black citizens," and "sending notices to local organizations comprised predominantly of black citizens…to advise them that the party intends to nominate persons to serve as election officials and encourage them to have interested persons notify the chairperson of the respective political party executive committee of their willingness to serve as election officials," at p. 4.

A 1993 consent order in *United States v. Johnson County, Georgia*, CV393-45 (S.D. Ga, Sept 14, 1993) stated that,

> 1. According to the 1990 Census, the total population in Johnson County is 34 percent black and the total voting age population is 29.2 percent black.
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> * * * * *
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> 7. Of the one hundred thirty one individuals who were employed by Johnson County to serve as poll officials between 1988 and August 1992, eighteen (14%) were black. There were no black poll workers during this period at seven of the twelve polling places.
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> 8. Only eight (12%) of the Sixty-six poll officials employed by Johnson County for the July 21, 1992 primary election were black. There were no black poll workers at eight of the twelve polling places.
>
> 9. Of the one hundred and six poll officials employed by Johnson County for the November 3, 1992 general election, only sixteen (15%) were black. There were no black poll workers at six of the twelve polling places.
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> 10. No black person has ever served as a managing poll officer or an assistant managing poll officer at any of the county's polling places.

At pages 2-3.

Included in the *Johnson County* consent decree among the steps the defendant county commission and supervisor of election must take to have African Americans fairly represented among the polling place workers are, "sending written notices to local organizations comprised predominantly of black citizens …to advise them that the county

intends to appoint black persons to serve as poll workers and poll managers;" and "contacting black candidates and members of the political parties…to ascertain the names, addresses and telephone numbers of black citizens who are qualified and available to serve as poll officers." Id. at 6. In addition, the defendants must publicize in local newspapers, on radio, on television and on posters their policy of conducting elections free of racial discrimination. They also must train the poll workers on how to perform their duties in a racially nondiscriminatory manner, and, with specificity, on how to deal with voters who need assistance.

Even with the specific steps set out in the 15 page *Johnson County* consent decree, the reports of federal observers showed that African American citizens of the Johnson County were continuing to be excluded from among the ranks of those appointed to work at the polls because the supervisor of elections did not adhere to the terms of the decree. After further discussions between the county and DOJ, in lieu of DOJ pursuing contempt of court proceedings the county appointed a biracial committee formed of county residents to perform the preliminary poll worker recruitment and nomination functions previously performed by the election supervisor, leaving her with her statutory duty of formally appointing the poll workers. (This change in practice was reviewed and precleared under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c.) As a result, African Americans were fairly appointed among those who worked at the polls, and discrimination against African American voters at the polls abated in Johnson County, Georgia.

Both the *Conecuh County* and *Johnson County* cases show how information gathered by observers can serve as the evidentiary basis for litigation, how particular individuals at the county level can persist in discriminatory procedures in spite of state law and federal litigation, and how the identity and training of the people working inside the polling places is of primary importance in eliminating injustice from the polls. It should be remembered that in both instances the DOJ lawyers first shared their information with state and local election officials in an attempt to allow those officials to eliminate the discriminatory treatment of voters. These efforts provided the election officials with something they could obtain by themselves, but did not: information about what went wrong in their polls. The need for the resulting litigation demonstrated that those officials were not willing to stop the discriminatory conduct.

**Court-ordered remedies require counties to do their jobs for language minorities.**

Even after the Voting Rights Act was amended in 1975 to require that areas designated under a formula must provide information and ballots in languages other than English, inadequate training of polling place workers continued to disadvantage minority language voters. The reports of federal observers gave the attorneys from the Department of Justice the information they needed to prove to county officials that violations of the Voting Rights Act had occurred, and to obtain consent decrees that set out specific steps that the counties would take to effectively provide and translate election information to Native American citizens.

Most of the consent decrees to cure discriminatory actions in Indian country under the language minority provisions of Section 203 of the Voting Rights Act, 42 U.S.C. § 1973aa-1a, were lengthy and set out in detail the procedures that election officials had to follow for voter education, voter registration, translation and balloting.[23] It is significant that the great majority of the provisions in the consent decrees focused on the counties' administrative responsibilities, including hiring additional county personnel, to try to give Native American voters equivalent access to information about an election and voting procedures as white people got as a matter of course, since all information was provided in English and in areas near the county seats.

Thus, the Stipulation and Order in *United States v. Cibola County, New Mexico*, No. Civ 93 1134 LH/LFG, (D.N.M., Apr. 21, 1994)(three-judge court), is 44 pages long, 33 pages of which is a Native American Election Information Program. This program provides that, "Cibola County shall employ at least three Native American Voting Rights Coordinators who will coordinate the Native American Election Information Program in Cibola County…" These coordinators have to be bilingual in either Navajo or Keres and English, they are to be hired only after the county consults with the tribes, they are to be trained in all aspects of the election process, they are to attend and make presentations at chapter and tribal council meetings, and perform numerous, specifically described functions that would provide election information to the Native American citizens of Cibola County.

It was and remains difficult, however, to compel obdurate county clerks and other county election administrators to perform the myriad election-connected functions in a way that meets the requirements of the court orders.[24] These cases argue persuasively for continuing the practice of seeking lengthy, detailed court orders that can be enforced through contempt proceedings.

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[23] For example, the Consent Agreement is 36 pages long in *United States v. Socorro County, New Mexico*, Civil Action No. 93-1244-JP (D.N.M. Apr. 13, 1994) (three-judge court); in *United States v. State of New Mexico and Sandoval County, New Mexico*, Civil Action 88-1457-SC (D.N.M. Mar. 28, 1990) (three-judge court), is 12 pages long, and the accompanying Native American Election Information Program filed on April 30, 1990, is 24 pages long; the First Amended Settlement and Order in *United States v. San Juan County, Utah*, Civil Action No. C-83-1287 (D. Utah, Aug. 24, 1990) (three-judge court), is 21 pages; the First Amended Consent Decree and Order in *United States v. McKinley County, New Mexico*, Civil Action No. 86-0028-M (D.N.M., Jul. 20, 1990) (three-judge court), is 23 pages; and the Consent Decree in *United States v. State of Arizona*, CIV 88-1989 PHX EHC (D. Ariz, May 22, 1989), affecting Apache and Navajo Counties, is 24 pages, while the First Amended Consent Decree in that case (Jan. 3, 1994) is 28 pages long.

[24] A letter of understanding was developed between DOJ and San Juan County, New Mexico, which required the county to adopt a manual of procedures to comply with the language minority requirements of the Voting Rights Act. The manual would become final after review and concurrence by DOJ. Changes in the procedures would become effective upon the concurrence of DOJ. Letters of understanding have not been widely used by DOJ in its Voting Rights Act enforcement. The letters have the advantage of getting a fast remedy and avoiding the uncertainties of litigation. The main disadvantage of using a letter of understanding is the inability to seek contempt of court sanctions if the county does not follow the steps in the letter or the county's manual of procedures. If the actions that the county fails to take are significant, a legal action would need to be filed at that time, prolonging the time for obtaining a remedy.

An alternative approach was taken in a consent decree between DOJ and Bernalillo County, New Mexico, where the court order was accompanied by a manual of procedures to comply with the language minority requirements of the Voting Rights Act. *United States v. Bernalillo County, New Mexico*, CV-98-156 BB/LCS (D.N.M. Apr 27, 1998). The consent decree required that the county hire a native language coordinator who is bilingual in Navajo and English, and specifically noted that, "The primary responsibility of the [native language coordinator], a full-time employee of Bernalillo County, shall be to carry out the county's Navajo language election procedures, publicity and assistance, including assisting the county to carry out the procedures in the manual…" at p. 4. The consent decree also required the county to establish a travel, supply, and telephone call budget for the native language coordinator, and subjected the county to the preclearance provision in Section 3(c) of the Voting Rights Act, 42 U.S.C. § 1973a(c), which allows the county to make changes in the manual and for DOJ to review those changes to determine that they are nondiscriminatory before they can be implemented. This approach has the benefit of allowing the county to tailor its administrative procedures to its particular personnel and office situation, and of allowing practical changes to be made in the administrative procedures when necessary without having to request the three-judge court for an amendment to the court order.

**Conclusion.**

The federal observer provision of the Voting Rights Act continues to be extraordinarily effective in allowing the United States Department of Justice to enforce the Voting Rights Act. That provision should be extended.

The federal examiner provisions of the Voting Rights Act have accomplished their goal of allowing African American voter access to the voter rolls in areas where official resistance kept them from becoming registered voters. Those provisions have done their job and should be eliminated, especially insofar as they are prerequisites for the assignment of federal observers.

The federal observer provision of the Voting Rights Act performs an effective law enforcement function as it is written and applied. That provision should not be altered.
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APPENDIX A

NUMBER OF PERSONS LISTED BY FEDERAL EXAMINERS
UNDER SECTION 7 OF THE VOTING RIGHTS ACT, 42 U.S.C. 1973e
1965 - 2000[25]

| State | Total People Listed | Non-white People Listed | White People Listed |
|---|---|---|---|
| Alabama[26] | 66,539 | 61,239 | 5,300 |
| Georgia[27] | 3,557 | 3,541 | 16 |
| Louisiana[28] | 26,978 | 25,136 | 1,842 |
| Mississippi[29] | 70,448 | 67,685 | 2,763 |
| South Carolina[30] | 4,654 | 4,638 | 16 |
| Total | 172,176 | 162,239 | 9,937 |

[25] This information is extracted from the Semiannual Report of Cumulative Totals on Voting Rights Examining as of December 31, 2000, Prepared by the Office of Workforce Information, Office of Merit Systems Oversight and Effectiveness, U.S. Office of Personnel Management, Washington, D.C. 20415.
[26] People were listed in Autauga, Dallas, Elmore, Greene, Hale, Jefferson, Lowndes, Marengo, Montgomery, Perry, Sumter and Wilcox Counties.
[27] People were listed in Butts, Lee, Screven and Terrell Counties.
[28] People were listed in Bossier, Caddo, DeSoto, East Carroll, East Feliciana, Madison, Ouachita, Plaquemines and West Feliciana Parishes.
[29] People were listed in Amite, Benton, Bolivar, Carroll, Claiborne, Clay, Coahoma, DeSoto, Forrest, Franklin, Grenada, Hinds, Holmes, Humphreys, Issaquena, Jasper, Jefferson, Jefferson Davis, Jones, LeFlore, Madison, Marshall, Neshoba, Newton, Noxubee, Oktibbeha, Pearl River, Quitman, Rankin, Sharkey, Simpson, Sunflower, Tallahatchie, Walthall, Warren, Wilkenson, and Winston Counties.
[30] People were listed in Clarendon and Dorchester Counties.

APPENDIX B

ASSIGNMENT OF FEDERAL OBSERVERS
UNDER SECTION 8 OF THE VOTING RIGHTS ACT, 42 U.S.C. 1973f
BY YEAR AND STATE, 1966 - 2000[31]

| Year | AL | GA | LA | MS | NC | SC | AZ | CA | IL | MI | NJ | NM | NV | NY | TX | UT | WI | TOTAL |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 1966 | 823 | 22 | 397 | 470 | | 158 | | | | | | | | | | | | 1,870 |
| 1967 | | | 215 | 1,108 | | | | | | | | | | | | | | 1,323 |
| 1968 | 252 | 138 | 125 | 507 | | 152 | | | | | | | | | | | | 1,174 |
| 1969 | 44 | | 20 | 325 | | | | | | | | | | | | | | 389 |
| 1970 | 403 | 6 | 16 | 126 | | 19 | | | | | | | | | | | | 570 |
| 1971 | | | 54 | 960 | | | | | | | | | | | | | | 1,014 |
| 1972 | 140 | 44 | 60 | 146 | | 105 | | | | | | | | | | | | 495 |
| 1973 | | | | | | | | | | | | | | | | | | 0 |
| 1974 | 234 | 64 | 56 | 100 | | | | | | | | | | | | | | 454 |
| 1975 | | 11 | 116 | 1,252 | | | | | | | | | | | | | | 1,379 |
| 1976 | 181 | 67 | 33 | 132 | | | | | | | | | | | 193 | | | 606 |
| 1977 | | | | 89 | | | | | | | | | | | | | | 89 |
| 1978 | 598 | 4 | | 31 | | 67 | | 146 | | | | | 3 | | 90 | | 6 | 945 |
| 1979 | | | 130 | 1,212 | | | | 140 | | | | | | | | | | 1,482 |
| 1980 | 272 | 156 | 12 | 274 | | | | | | | | | | | 19 | | | 733 |
| 1981 | | | | 72 | | | | | | | | | | | | | | 72 |
| 1982 | 973 | 58 | 23 | 37 | | | | | | | | | | | | | | 1,091 |
| 1983 | 187 | | 3 | 1,288 | | | | | | | | | | | | | | 1,478 |
| 1984 | 260 | 137 | | 439 | 70 | 158 | | | | | | | | | 10 | | | 1,074 |
| 1985 | | 19 | | 152 | | 7 | | | | | | | | 107 | | | | 285 |

[31] This information is extracted from the summary of federal observer activity by calendar year, United States Department of Justice, Civil Rights Division, Voting Section. Southern states are listed first in this chart because federal observers were assigned only to Southern states for the first years shown.

| Year | AL | GA | LA | MS | NC | SC | AZ | CA | IL | MI | NJ | NM | NV | NY | TX | UT | WI | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 1986 | 149 | 15 | | 155 | | | 40 | | | | | 65 | | | | | | 424 |
| 1987 | 51 | | | 490 | | | | | | | | 12 | | | 15 | | | 568 |
| 1988 | 127 | 65 | | 124 | 39 | 45 | 150 | | | | | 89 | | | 31 | 23 | | 693 |
| 1989 | 13 | | | 13 | | | | | | | | 22 | | 132 | | | | 180 |
| 1990 | 61 | 72 | | | 36 | 67 | 145 | | | | | 72 | | | | 25 | | 478 |
| 1991 | | 12 | | 345 | | 40 | 3 | | | | | 38 | | 19 | | | | 457 |
| 1992 | 53 | 151 | | 23 | | | 181 | | | | | 87 | | 17 | 5 | 13 | | 530 |
| 1993 | 11 | 84 | | 124 | | 20 | 25 | | | | | 36 | | 230 | | | | 530 |
| 1994 | 95 | 18 | 11 | 35 | 45 | | 109 | | | | | 147 | | 55 | | 18 | | 533 |
| 1995 | | | 19 | 104 | | | | | | | | 29 | | | | | | 152 |
| 1996 | 39 | 76 | | 121 | | 72 | 108 | 39 | | | | 89 | | 36 | 24 | 17 | | 621 |
| 1997 | 5 | | | 174 | | | | 7 | | | | 5 | | 28 | | | | 219 |
| 1998 | 29 | 6 | | | | | 109 | 20 | | | | 129 | | 12 | | 19 | | 324 |
| 1999 | | 5 | 56 | 342 | | | | | | | 50 | 6 | | | | | | 459 |
| 2000 | 44 | 42 | 8 | 24 | | | 105 | 23 | | 68 | 128 | 140 | | 23 | 16 | 19 | | 640 |
| TOTAL | 5,044 | 1,272 | 1,354 | 10,794 | 190 | 2,046 | 975 | 375 | 0 | 68 | 178 | 966 | 3 | 659 | 403 | 134 | 6 | 23,331 |

APPENDIX C

EXCERPTS FROM PLAINTIFF'S RESPONSE TO INERROGATORIES AND REQUEST FOR PRODUCTION OF DOCUMENTS, *United States v. Conecuh County, Alabama*, Civil Action No. 83-1201-H (S.D. Ala., Jun 12, 1984).

> A white voter waiting in line to vote stated to white poll official John P. Bewley that she was unable to obtain a yellow sample ballot distributed by the Alabama Democratic Conference. The black voter standing next in line had such a ballot. Mr. Bewley stated, "You ain't [sic] of the right color." During the same day, Mr. Bewley stated to federal observer Riddle, "See, the niggers bring in these yellow marked ballots. The nigger preachers run the niggers down here, you know. They tell them how to vote. I don't think that's right."

P. 7.

> Poll officials instructed white registered voters to confirm their registration status in the office of the Probate Judge. Black voters whose names were not on the list were in each instance simply told that they could not vote, and were given no instruction by poll officials. White voter Salter's name did not appear on the list, and Ms. Salter acknowledged that she resided in a rural precinct and not in box 11-1. Ms. Salter nevertheless was allowed to vote an unchallenged ballot directly on the machine.

Pp. 8-9.

> Ms. Lewis, who required assistance because of a vision problem, signed the poll list and stated that she wished for her companion (unidentified) to provide assistance in voting for her. White poll official Windham stated, "Can't nobody go in there with you." After a pause, Mr. Windham stated to Ms. Lewis, "you can fill out an affidavit and then she can go in with you. Can't you [read]?" Mr. Windham's tone and manner were sufficiently abrasive that Ms. Lewis left the voting place. Some moments later she was observed to remark to a companion, who was trying to persuade her to make another attempt to vote, "I've done had trouble with them twice before and I'm not begging them any more. I'm not scared but I'm not begging anybody." Ms. Lewis returned accompanied by Mr. Richard Rabb, at that time the Chair of the Conecuh county Branch of the Alabama Democratic Conference. Ms. Lewis was allowed to vote, and the poll officials provided necessary assistance with the affidavit. Ms. Lewis remind very upset and remarked, "Why couldn't they have let me vote to begin with?"

Pp. 16-17.

> Black voters at box 9-1 (Old Town) were told throughout the day of the October 12, 1982 special run-off election, that no more than two voters were allowed in

the polling place at one time. This restriction was imposed on 30-35 occasions. In no instance were white voters required to conform to this procedure, and the poll officials allowed a many as five white voters in the polling place at a time.

P. 21.

Ms. Stacey enforced the limitation on the amount of time a voter could spend in the booth in a random and discriminatory fashion. She enforced the limitation against black voters more frequently than against white voters. During the last hour of voting the requirement was applied exclusively against black persons. On at least two occasions she told black voters that their time had elapsed when, in fact, it had not.

P. 24

During the course of the day, poll officials addressed all black voters by their first names. Older white voters were addressed by the courtesy titles of Mr. and Ms.

P. 35

White poll official James Ellis initiated new procedures for assistance of black voters. Without notice to any person, Mr. Ellis required assistors accompanying voters into the polling place to remain 30 feet outside the polls until Mr. Ellis had finished interviewing the voter and summoned the assistor.

Pp. 36-37.

Poll officials who assisted black voters did not read the ballot to the voters or otherwise advice the voters of the contests and the candidates. They simply asked the voters, “Who do you want to vote for?

* * * * *

Poll official Lois Stacey marked the ballot for a voter she was assisting in contests in which the voter did not express a preference.

* * * * *

Poll officials frequently served as assistors without asking voters receiving assistance who they wanted to assist them. On a number of occasions, poll officials serving as assistors did not read the complete ballot to the voters.

P.40

APPENDIX D

JURISTICTIONS CERTIFIED FOR FEDERAL EXAMINERS
UNDER SECTION 3(A) OF THE VOTING RIGHTS ACT AS OF 2000[32]

| State | Jurisdiction | Term of certification |
|---|---|---|
| Illinois | Town of Cicero | October 23, 2000 order, effective until December 31, 2005 |
| Louisiana | St. Landry Parish | December 5, 1979 order, effective until further order of the court |
| Michigan | City of Hamtramck | August 7, 2000 order, effective until December 31, 2003 |
| New Jersey | Passaic County | June 2, 1999 order, effective until December 31, 2003 |
| New Mexico | Bernalillo County | April 27, 1998 order, effective until June 30, 2003 |
| | Cibola County | April 21, 1994 order, effective until April 21, 2004 (originally certified by December 17, 1984 order) |
| | Sandoval County | September 9, 1994 order, effective until at least September 9, 2004 (originally certified by December 17, 1984 order) |
| | Socorro County | April 11, 1994 order, effective until April 11, 2004 |
| Utah | San Juan County | December 31, 1998 order, effective until December 31, 2002 (originally certified by January 11, 1984 order) |

[32] Information obtained from *Jurisdictions Currently Eligible for Federal Observers as a Result of Orders Under Section 3(a) of the Voting Rights Act*, United States Department of Justice, Civil Rights Division, Voting Section, October 22, 2001.